SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1969.

No. 518

JOSEPH HENDLER, A MINOR, BY ABRAHAM HENDLER, HIS FATHER AND NEXT FRIEND, AND ESTHER HENDLER, A MINOR, BY ABRAHAM HENDLER, HER FATHER AND NEXT FRIEND,

Petitioners,

vs.

MIRIAM WOLOZIN, NAT WOLOZIN, CHICAGO TRANSIT AUTHORITY, A MUNICIPAL CORPORATION, AND HARRY J. ZANOTTI,

Respondents.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI.

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STATEMENT OF THE CASE.

The jury found both generally and specially for respondents upon the issue of liability (Rec. 293-300; Abs. 28). The jury specifically found that none of the defendants had been guilty of negligence causing injury to the plaintiffs (Rec. 293-300; Abs. 28).

Petitioners in their statement of the case assert that the evidence was in sharp conflict, but they do not make any such contention as a reason for granting certiorari, or in

connection with any of the reasons given by them for granting a writ of certiorari. Even had they done so (which is not the case), such contention would be unfounded.

Respondents show that the evidence clearly sustained the findings of the jury; no other findings would have been consistent with the course of justice, or the evidence.

The testimony overwhelmingly established that the accident took place simply because two young children (petitioners), with the impetuosity of youth, dashed across a street in front of a parked bus owned by one of the respondents and *into the side* of a passing automobile operated by another respondent.

The bus driver (one of the respondents), seeing the approaching automobile, shouted for the children to stop when he first saw them leave the curb and run across in front of the bus toward the automobile which was about to pass the standing bus. But, he shouted in vain (Rec. 2269; Abs. 751). The automobile was not going fast (Rec. 2269; Abs. 751). It was able to come to a complete stop within about 10 or 15 feet (Rec. 2077; Abs. 667).

The testimony of the bus driver that he shouted for the children to stop was attested by other witnesses. One was a bus passenger (Rec. 2171; Abs. 713). The other witness was not a passenger. The shout of the bus driver was in such a loud tone that it could be heard by the second witness who was across the street at the time (Rec. 2223; Abs. 732).

Petitioners' assertion that the evidence was in sharp conflict is clearly an after thought without any foundation. It is significant that they did not think enough of it to raise it as an issue in the Appellate Court.

ARGUMENT.

I.

PETITIONERS DO NOT RAISE ANY CLAIM THAT THEY WERE DENIED THE RIGHT TO BE HEARD OR THE RIGHT TO BE REPRESENTED BY COUNSEL. THEY RAISE ONLY ISSUES OF LAW AS TO ALLEGED IMPROPER RULINGS BY THE TRIAL JUDGE AND THE APPELLATE COURT UPON EVIDENTIARY AND PROCEDURAL QUESTIONS.

Two minors, hereinafter referred to as petitioners, brought this suit in the Circuit Court of Cook County, Illinois through their father as their next friend.

Petitioners were represented in the trial court, the Illinois Appellate Court and in the Illinois Supreme Court by a very competent lawyer of years of experience. He represents them in this court.

Thus, petitioners have been adequately represented at all times both by their able lawyer and their father. Consequently they raise no issue that they were inadequately represented.

Petitioners raise no claim that they were denied an apportunity to be heard. Nor could they, because they were given full opportunity to be heard in the trial court, the Appellate Court and the Illinois Supreme Court.

There is nothing unique about the case whatsoever. It is one for personal injuries. Except for the precise nature of the negligence charged, which is never the same in any two cases, it does not differ in its essential elements from the thousands of personal injury cases tried throughout this country every year, in many of which minors are parties.

It is well settled that the mere error of a trial judge in admitting evidence or entering judgment is not a denial of due process of law in violation of the Fourteenth Amendment (*Jones* v. *Buffalo Creek Coal Co.*, 245 U. S. 328-329, 38 S. Ct. 125, 62 L. Ed. 292, 1917). The Fourteenth Amendment does not permit a party to bring to the test of a decision every ruling made in the course of a trial by a state court (*Buchalter* v. *New York*, 319 U. S. 427-430, 63 S. Ct. 1129, 87 L. Ed. 1492, 1943).

Every contention raised by plaintiffs goes to procedural rulings or evidentiary questions which were raised by plaintiffs during trial or in their post trial motion and which were again raised in the Appellate Court on review of those rulings. The Fourteenth Amendment does not assure either uniformity of state court decisions or freedom from error (*Milwaukee Electric Ry. and Light Co.* v. *Wisconsin ex rel. Milwaukee*, 252 U. S. 100-106, 40 S. Ct. 306, 64 L. Ed. 443, 1920; *Worcester County* v. *Riley*, 302 U. S. 292-299, 58 S. Ct. 185, 82 L. Ed. 268, 1937). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question (*Beck* v. *Washington*, 369 U. S. 541-555, 82 S. Ct. 955, 8 L. Ed. 2d 98, 1961).

Petitioners contend that the Appellate Court fell into error by misapplying or misapprehending Illinois law. Their contention that they are thus entitled to a writ of certiorari runs athwart the well established construction of the Fourteenth Amendment that a mere erroneous decision of a state court in the regular course of a judicial decision does not deprive the unsuccessful party of due process of law (*American Ry. Express Company* v. *Kentucky*, 273 U. S. 269-273, 47 S. Ct. 355, 71 L. Ed. 639, 641, 1927).

As previously noted, no contention is made by petitioners that they were denied adequate representation or they were not fully heard in the Illinois courts. Where the parties

have been fully heard in a state court in the regular course of judicial proceedings an erroneous decision of the court does not deprive them of due process of law (*Bonner* v. *Gorman,* 213 U. S. 86, 91, 29 S. Ct. 483, 53 L. Ed. 706, 1908; *Central Land Co.* v. *Laidley,* 159 U. S. 103-112, 16 S. Ct. 80, 40 L. Ed. 91, 1894; *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 450, 44 S. Ct. 197, 68 L. Ed. 382, 1923).

The due process clause does not control mere forms of procedure in state courts; all of its requirements are met where, as here, a party had sufficient notice and an adequate opportunity to be heard (*Holmes* v. *Conway,* 241 U. S. 624-631, 36 S. Ct. 681, 60 L. Ed. 1211, 1915).

Petitioners do not present a federal question, since the issue they raise is merely that the Appellate Court made an erroneous decision, a claim which will not merit the issuance of a writ of certiorari (*Bell Telephone Co.* v. *Pennsylvania Public Utility Co.,* 309 U. S. 30-32, 60 S. Ct. 411, 84 L. Ed. 563, 565, 1939).

The two cases relied upon by petitioners (*Kent* v. *U. S.,* 383 U. S. 527, 1966; *ReGault,* 387 U. S. 1, 1967) have no application whatsoever. In *Kent* a ward of the Juvenile Court of the District of Columbia had both the statutory and constitutional right to a hearing by that Court as to whether it would waive jurisdiction over him so that he might be tried in the U. S. District Court upon a criminal charge. The Juvenile Court had arbitrarily denied his motion for a hearing. This Court held that the action of the trial court was improper.

In *ReGault,* 387 U. S. 1 (1967) a Juvenile Court in Arizona had committed a 15 year-old defendant to be confined in a state industrial school until he should be 21. This Court held that the action of the Juvenile Court to be in violation of the Fourteenth Amendment, since (1) the minor did not receive adequate notice of the Juvenile Court

proceeding, (2) he was denied the right to be represented by counsel at the hearing, (3) his right against self incrimination was infringed upon.

Petitioners were fully heard in the trial court and the Appellate Court upon all issues submitted by them and they do not argue to the contrary. They were represented at all times by a competent lawyer and brought their suit through their father as their next friend.

II.

AN EXAMINATION OF EACH OF THE ISSUES RAISED BY PETITIONERS SUSTAINS RESPONDENTS' CONTENTIONS THAT ALL RELATE TO ALLEGED IMPROPER RULINGS BY THE TRIAL JUDGE AND THE APPELLATE COURT AND THAT NONE OF THEM RAISE ANY QUESTION THAT PETITIONERS WERE DENIED THE RIGHT TO BE HEARD OR THE RIGHT TO BE REPRESENTED BY COUNSEL.

Petitioners, at p. 6 of their petition, submit five instances in which they claim they were "'deprived of their right to a fair trial and the equal protection of the laws''.

Issues 1 and 2 are similar. They refer to what petitioners regard as unnecessary references to religion at the trial. These issues were called to the attention of the trial judge and raised in petitioners' motion for new trial (Rec. 2940-2955; Abs. 1085-1106), which was denied (Rec. 326-327; Abs. 29). The same issues were submitted to the Appellate Court and found wanting.

Both of the foregoing issues were closely examined by both the trial and Appellate Courts to be unfounded in the evidence and unwarranted under the procedural law of Illinois. None involved the basic issues of whether petitioners were represented by counsel and had been given the right to be heard.

Issue No. 3 is that the trial court and Appellate Court should not have disregarded "cumulative error" in determining whether petitioners were entitled to a new trial. But again the issue was clearly a question of law determined by the trial court and the Appellate Court to be unfounded in the law of evidence and procedure in Illinois, and having no relationship whatsoever to whether petitioners were represented by counsel or were given the right to be heard.

Issue No. 4 is that the trial court and Appellate Court sanctioned argument that a brain-damaged child should be compelled to "be present *throughout* a three—week trial so that he might be observed by the jury". It is significant that nowhere do petitioners submit a record or abstract reference that respondents made statements of that nature to the jury. Neither can they, because the record is bereft of a syllable that statements of that nature were made to the jury. Furthermore even if there were a factual basis for the issue (which is not the case), it would be merely an evidentiary or procedural one under Illinois law and one of law having no relationship with whether petitioners had a right to be heard or to be represented by counsel.

Issue No. 5 is that the Appellate Court has applied adult standards to minors in the review of court proceedings. The issue tendered is ambiguous and is made even more ambiguous by the failure of petitioners to argue it at any place in their petition, so that it might be clarified. It is difficult for respondents to reply to an ambiguous issue which they do not even clarify with argument.

If petitioners mean that in Illinois appellate procedure, the Appellate Court has followed the same standard that it does in cases involving adults, then that would be merely an issue of Illinois law resolved against petitioners by the Appellate Court. The only thing clear about the issue as

tendered is that it does not involve whether petitioners were given the right to be heard or be represented by counsel.

III.

THAT THE CASE WAS TRIED FAIRLY WAS AN ISSUE OF LAW DECIDED ADVERSELY TO PETITIONERS BY THE APPELLATE COURT.

The Appellate Court concluded: "We do not feel that plaintiffs were prejudiced in this case by arguments of defense counsel when the record is reviewed as a whole". (p. 4a)

Even had the Appellate Court been mistaken in its conclusion, it would have been no more than an error of law, and, thus, will not warrant this court granting a writ of certiorari.

However, respondents feel that, while not obliged to go further and belabor an issue that will not warrant this court to grant certiorari, the following comments should be made to demonstrate that the conclusion of the Appellate Court was on firm grounds and that petitioners' charges have been made unfairly and are utterly groundless.

The record shows beyond peradventure of doubt that it was petitioners, not respondents, who initiated and introduced the religious element into the case. In his opening statement petitioners' attorney told the jury that plaintiffs attended a Hebrew parochial school and gave an elaborate description of the curriculum (Rec. Add. Abs. 1-2). He even informed the jury that at the time of the accident petitioner Joseph Hendler was wearing a yamulka, the traditional Jewish skull cap, under his snow suit (Add. Abs. 1-2).

At the time of trial, petitioner Esther Hendler (who was a witness), was 15 years old. Four teenage girls testified for petitioners: two were age 14 (Rec. 449, 499; Abs. 45, 62) and two were age 12. (Rec. 597, 715; Abs. 94, 136).

It was not necessary to qualify Esther Hendler and the two witnesses who were 14, and show that they understood the difference between right and wrong and what it means to tell the truth because of their age. (*Shannon* v. *Swanson*, 208 Ill. 52, 54-55, 69 N. E. 869). Neither was it necessary to qualify the two who were 12, because defendants made no objection to their qualifications.

Petitioners, nevertheless, repeatedly and unnecessarily examined each of these witnesses in detail, showing the Jewish schools they attended; that they learned prayers in Hebrew; that they studied the bible and Jewish law and other details of their Jewish curriculum; and that they were taught to tell the truth. (Rec. 449, 454, 598, 601, 715, 716, 724; Abs. 45, 47, 94, 95, 137, 139).

Twice respondents' attorneys objected vehemently to petitioners' examination of the witnesses upon those subjects (Rec. 453, Abs. 46; Add. Abs. 9-10). In the face of our showing that Illinois law did not require witnesses of that age to be proved to be qualified, each time objection was made petitioners' attorney insisted that the testimony was competent, assigning the utterly improper ground that it related to the credibility of the witnesses and their understanding of an oath (Rec. 453; Abs. 46). The court overruled respondents' objections.

In his closing argument, plaintiffs' counsel appealed to the jury to believe his witnesses upon the basis of this "background," as compared to the other witnesses in the case (Rec. 2737; Abs. 971), thus continuing to bring to the attention of the jury the matter of the plaintiffs' religion.

In so doing, petitioners gave scant heed to the well-stated view of the Illinois Appellate Court that, "The unnecessary injection of religious or political questions into a case diverts the jurors from judicial consideration of the facts and the law regardless of whether their response may be friendly or antagonistic." (*Bulleri* v. *Chicago Transit Authority*, 41 Ill. App. 2d 95, 190 N. E. 2d 476, 479.)

In these circumstances, it seems astounding that petitioners now boldly complain that respondents injected a religious issue into the case when it was petitioners who did so. It is no wonder that the Appellate Court rejected petitioners' issue that respondents injected a religious issue into the case, and that the Illinois Supreme Court denied their petition for leave to appeal.

With the foregoing background we will examine the specific instances in which petitioners claim that respondents improperly injected a religious issue into the case and that the trial court and Appellate Court failed to protect minor litigants.

A.

Petitioners complain of remarks during the trial by respondents' attorneys that two of respondents' witnesses (Levey and Berzon) were of the same religious faith as petitioners. They also claim that there is nothing in the record to show the religion of either witness. The latter claim is without merit, since the record shows that Levey had been a schoolmate of petitioners' brother, who had the same kind of a Hebrew parochial education as his sister, petitioner Esther Hendler (Rec. 2152, 2785; Abs. 701, 1065).

It is amazing that petitioners, having introduced into the case the religious background of their own witnesses as a test of credibility, over the objections of respondents, should now complain that respondents informed the jury that two of their witnesses were of the same background.

If the two witnesses were of the same religious faith as petitioners, they may not complain of the same argument of credibility which they have advanced for their own witnesses. On the other hand, if the two witnesses were not of the same religious faith as petitioners, the statements made by respondents' attorneys were completely harmless.

If, in fact, religion is as irrelevant in this case as plaintiffs now on appeal concede, plaintiffs could not have been prejudiced by the statement that certain of respondents' witnesses were of the same religion as petitioners and their principal witnesses, irrespective of what the actual fact may have been.

In their petition, p. 9, petitioners have quoted from the Appellate Court opinion in a misleading way, so as to make it appear that when the Appellate Court stated "Certainly much of this was improper," the court was directing its remarks solely or particularly to the claims regarding Levey and Mrs. Berzon. *To do this petitioners omit 19 lines of the opinion from their quotation.* (Opinion, pp. 4a-5a), and change the letter "C" in "Certainly" to lower case (c).

Such artful quotation is not a proper method of seeking a writ of certiorari.

The Appellate Court correctly held (Opinion, p. 5a):

> "We do not feel that the plaintiffs were prejudiced in this case by the arguments of defense counsel when the record is reviewed as a whole."

B.

Equally groundless is petitioners' claim that respondents' attorneys told the jury that there was a conspiracy against their clients by members of the Jewish faith.

All that respondents' counsel did was to comment that there had been a meeting at the Arie Crown School at

which a group of petitioners' witnesses was present. Petitioners improperly infer that respondents' attorneys thereby injected a religious issue into their arguments, for no other reason, as petitioners claim, than that the Arie Crown School is one conducted under Jewish auspices, and that the meeting of the witnesses happened to have been held there.

Petitioners do not question the general right of attorneys to comment upon a meeting of the witnesses in any case. In other words, if the same meeting had been held in a law office or in a home, then according to petitioners' reasoning, the charge of "conspiracy by people of the Jewish faith" would not have existed. But, if you change the locale of the meeting to a parochial school, respondents' attorneys could not even so much as mention the meeting. To have done so would be to charge "a conspiracy by people of the Jewish faith," and introduce religion into the case, by petitioners' line of reasoning.

Petitioners opened the subject of the meeting at the school in their direct examination of one of their witnesses, who, at the instance of plaintiffs' attorney, testified that people had come to see her at school and that she was interviewed (Rec. 611; Abs. 98). Another of petitioners' witnesses testified upon direct examination that after the occurrence she was interviewed. (Rec. 517-518; Abs. 69.)

The cross-examination of two witnesses (quoted in petitioners' petition, pp. 11-13) merely went to the interviews and developed that at those interviews, a representative of petitioners was present and that various children were interrogated. Petitioners having opened the subject upon direct examination, it was clearly proper for respondents' attorneys to go into it upon cross-examination and comment on it in argument.

C.

The final claim by petitioners that respondents' attorneys injected a religious issue into the case involves the direct examination of respondent, Miriam Wolozin, who remarked that ninety per cent of the neighborhood was Jewish. This remark was made during repondents' side of the case long after petitioners on their side of the case had saturated the trial with testimony about the religion of petitioners and four of their witnesses.

CONCLUSION.

Respondents submit that the petition for a writ should be denied and they pray that this Court shall so order.

Respectfully submitted,

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